

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 389 of 1980

with

SECOND APPEAL No 390 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
Nos. 1 to 5 No

VANKAR SAMA DEVA, SINCE D/D THROUGH HIS HEIRS

Versus

VNAKAR JASHBHAI RAGHABHAI

Appearance:

1. Second Appeal No. 389 of 1980
MR GIRISH PATEL for Petitioners
MR DD VYAS for Respondent No. 1
2. Second Appeal No 390 of 1980
MR GIRISH PATEL for Petitioners
MR BS SUPEHIA for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 11/03/98

COMMON ORAL JUDGEMENT

These two appeals between the same parties having identical questions of law are proposed to be disposed of by a common judgment.

The facts of Second Appeal No.389 of 1980 are that the appellant of this suit filed Civil Suit No. 113 of 1973 alleging himself to be the owner of piece of land measuring 20 feet east-west and 25 feet north-south known as cattle shed from the of plaintiff's fore-fathers but since 10 years before the same fell down due to heavy rains. The plaintiff was storing fuel over the cattle shed. Three houses of the respondent are situated at a distance of 5 feet from the southern boundary of this cattle shed. The respondent threatened to dispossess the appellant from the cattle shed. Hence the suit for permanent injunction was filed.

The suit was resisted by the defendant-respondent on the ground that the land in dispute does not belong to the plaintiff and that it is Government land and that the defendant is having right of passage to his house through this land and has also acquired easementary right of air and light to his house from this land which cannot be obstructed by the plaintiff. He therefore, pleaded that the suit is liable to be dismissed.

The defendant - respondent of this appeal thereafter filed a Suit No. 125 of 1973 against the present appellant alleging that the disputed land belongs to the Government and that he has acquired right of passage to go to his house and has also acquired easementary right of light and air to his house. He alleged that the plaintiff-appellant of this appeal raised certain construction causing obstruction to the passage and right of easement to receive air and light to his house. He sought decree for demolition and permanent injunction.

The said suit was also resisted by the appellant of this appeal on identical ground on which he filed Civil Suit No. 113 of 1973.

Both the suits were consolidated and tried together. The Trial Court dismissed the suit of the appellant bearing Suit No. 113 of 1973 whereas it decreed the suit of the respondent having numbered 125 of 1973 restraining the plaintiff-appellant of this appeal from causing any obstruction to the easementary right and further directing demolition of the structure raised by

the present appellant over the Government land.

The two appeals were filed by the present appellants against the aforesaid judgments and decrees of the Trial Court. Both the appeals failed, hence these two Second Appeals.

The substantial questions of law in Second Appeal No. 389 of 1980 are as under :

[1] Whether the Civil Suit No. 125 of 1973 filed by Jasa Raga was maintainable in view of the provisions contained in Sec. 91 of C.P.C. ?

[2] Whether the Civil Suit No. 125 of 1972 filed by Jasa Raga was maintainable at law in view of the fact that the State Government was not joined as the defendant ?

In Second Appeal No. 390 of 1980 the substantial questions of law were as formulated in the memo of appeal and those two questions were also the same as reproduced in Second Appeal No. 389 of 1980.

Shri Girish Patel, learned Counsel for the appellant and Mr.B.S.Supehia, learned Counsel for the respondents were heard at length. The judgments of the two Courts below and the material on record were examined.

The substantial question no.1 in the two Second Appeals are the same viz. bar of Section 91 of the Code of Civil Procedure. Shri Girish Patel, learned Counsel for the Appellant frankly stated that he does not press this issue consequentially it has to be held in both the appeals that the Civil Suit No. 125 of 1973 is not barred by Section 91 of the Code of Civil Procedure.

Coming to the second substantial question of law in the two appeals both are identical and it is to the effect whether the Civil Suit No. 125 of 1973 was not maintainable in view of the fact that the State Government was not joined as the defendant. Learned Counsel for the respondent has rightly pointed out that this plea was not specifically raised either in the Trial Court or in the First Appellate Court and that it is not pure question of law which can be permitted to be raised for the first time in this Second Appeal.

Learned Counsel for the appellant contended that he has nothing to say on the factual aspect of the case.

Controversy on question of fact has been settled by the two Courts below through concurrent findings. The said findings are that the land in suit does not belong to the plaintiff appellant of Second Appeal No. 389 of 1980. The second finding is that the said land belong to the Government and other finding is that the defendant-respondent of Second Appeal No.389 of 1980 acquired easementary right of passage to his house and further easementary right to receive air and light through disputed land owned by the Government. The another concluded finding is that this right of easement has been obstructed by the plaintiff in Second Appeal No.389/80. Upon these findings it can hardly be said that the Trial Court and the Appellate Court committed any illegality in dismissing the suit of the present appellant and decreeing the suit no.125/73.

Learned Counsel for the appellant further contended that in Suit No.125/73 the Government was a necessary party and since it was not impleaded two consequences will follow. First consequence is that adjudication of right of the respondent against the Government is imperfect inasmuch as the Government had no opportunity to defend its case. However, the two Courts below have held that the land in suit belongs to the Government and there is no adverse finding against the Government regarding title to the disputed land. Hence non-joinder of the State Government could not defeat Suit No. 125/73.

It was further contended by the learned Counsel for the appellant that even the easementary right in favour of the defendant-respondent could not be upheld against the Government in the absence of the Government. However, after going through the two judgments I find that actually the Trial Court found that the defendants right to use the Government land as passage to his house and to receive air and light to his house was considered vis a vis the plaintiff-appellant and not against the State Government. It found that this right was violated by the plaintiff-appellant and hence the decree for demolition of construction causing such obstruction was passed and also decree for permanent injunction causing obstruction by the plaintiff-appellant for such right of the defendant-respondent was also passed. It is thus manifest that the two Courts below did not hold that this easementary right was essentially acquired against the State Government and if the State Government prefers to take action against the defendant-respondent it will be free to do so through a separate suit and these two suits especially Suit No. 125/73 will not stand as a bar to

the right of the State Government against the defendant-respondent of Second Appeal No. 389 of 1980.

To sum up therefore it can be concluded that in the first place plea of non joinder of the State Government was neither specifically raised in the Trial Court nor in the First Appellate Court, hence it cannot be permitted to be raised in the Second Appeal. However, since arguments were heard on this point and held that the suit is not barred for non-joinder of the State Government, the second question is answered in the negative. In the result no merit is found in these two appeals which are hereby dismissed. No order as to costs.

Sd/-

(D.C.Srivastava, J)

m.m.bhatt